

1 Philip L. Pillsbury, Jr. (SBN 72261)
2 Richard D. Shively (SBN 104895)
3 Eric K. Larson (SBN 142791)
PILLSBURY & LEVINSON, LLP
The Transamerica Pyramid
4 600 Montgomery Street, 31st Floor
San Francisco, CA 94111
5 Telephone: (415) 433-8000
Facsimile: (415) 433-4816
6 Email: ppillsbury@pillsburylevinson.com
rshively@pillsburylevinson.com
rlarson@pillsburylevinson.com

8 Attorneys for Plaintiff
9 CROWLEY MARITIME CORPORATION

10
11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

14 CROWLEY MARITIME CORPORATION,) Case No. CV-08-00830 SI
15 Plaintiff,) [Hon. Susan Illston]
16 vs.)
17 FEDERAL INSURANCE COMPANY; TWIN) FIRST AMENDED COMPLAINT FOR
CITY FIRE INSURANCE COMPANY; and) BREACH OF CONTRACT; BREACH
RLI INSURANCE COMPANY,) OF THE IMPLIED COVENANT OF
Defendants.) GOOD FAITH AND FAIR DEALING;
) AND DECLARATORY RELIEF
20) DEMAND FOR JURY TRIAL
21)
22) Action Filed: January 7, 2008
23) Removal Date: February 6, 2008
Trial Date: None Set
24)

PILLSBURY & LEVINSON, LLP
The Transamerica Pyramid · San Francisco, CA 94111
600 Montgomery Street, 31st Floor

1 Plaintiff Crowley Maritime Corporation ("Plaintiff" or "Crowley") alleges as follows:

2 **GENERAL ALLEGATIONS**

3 1. At all material times, Crowley was and is a corporation that is in the business of
4 providing diversified transportation services in domestic and international markets by means of
5 four operating lines of business, including liner services, logistics services, marine services and
6 petroleum services. The company supports all four of its segments by providing corporate
7 services, supervising construction of new vessels and owning vessels which are chartered for
8 use in its operating lines of business.

9 2. Plaintiff is informed and believes that, at all material times, Defendants Federal
10 Insurance Company ("Federal"), Twin City Fire Insurance Company ("Twin City") and RLI
11 Insurance Company ("RLI") were and are corporations or other business entities authorized to
12 transact, and transacting, insurance business in the State of California.

13 3. At all material times herein, each Defendant acted as an agent and employee of
14 the remaining Defendants, and in doing the things hereinafter alleged acted within the course
15 and scope of said agency and with the permission and consent of its principals. The acts and
16 conduct of each said Defendant alleged herein were known to, authorized by, and ratified by
17 each of the other Defendants.

18 **THE FEDERAL INSURANCE POLICY**

19 4. Federal issued an Executive Protection Portfolio insurance policy (policy
20 number 8120-0792) to Crowley which includes an Executive Liability and Entity Securities
21 Liability Coverage Section (hereafter referred to as the "Federal Policy"). A true and correct
22 copy of the Federal Policy is attached hereto as Exhibit A. The Federal Policy was in effect
23 from November 1, 2004 to November 1, 2005 (the "policy period"), and provides -- among
24 other coverages -- primary executive indemnification coverage with limits of \$10,000,000.00
25 and a retention of \$500,000.00. The executive indemnification coverage is applicable to loss
26 for which Crowley grants indemnification to its directors and officers, on account of claims
27 first made during the policy period, for wrongful acts committed or allegedly committed before
28

1 or during the policy period. The Federal Policy was issued to Crowley in California, and is
2 governed by California law.

3 **THE TWIN CITY INSURANCE POLICY**

4 5. Twin City issued an Excess Financial Products Insurance Policy -- policy
5 number 00 DA 0100967-04 -- to Crowley which provides excess executive indemnification
6 coverage (hereafter referred to as the "Twin City Policy"). A true and correct copy of the
7 Twin City Policy is attached hereto as Exhibit B. The Twin City Policy sits directly above the
8 Federal Policy, and it provides first layer excess coverage that "follows form" with the
9 underlying Federal Policy (that is, the Twin City Policy is "subject to the same warranties,
10 terms, conditions, definitions, exclusions and endorsements"). The Twin City Policy was in
11 effect during the same policy period (November 1, 2004 to November 1, 2005), and has limits
12 of \$10,000,000.00 in excess of the limits of the underlying Federal Policy. The Twin City
13 Policy was issued to Crowley in California, and is governed by California law.

14 **THE RLI INSURANCE POLICY**

15 6. RLI issued an Excess Policy -- policy number EPG0002704A -- to Crowley
16 which provides excess executive indemnification coverage (hereafter referred to as the "RLI
17 Policy"). A true and correct copy of the RLI Policy is attached hereto as Exhibit C. The RLI
18 Policy sits directly above the Twin City Policy, and it provides second layer excess coverage
19 that also "follows form" with the underlying Federal Policy. The RLI Policy was in effect
20 during the same policy period (November 1, 2004 to November 1, 2005), and has limits of
21 \$5,000,000.00 in excess of the limits of the underlying Federal and Twin City Policies. The
22 RLI Policy was issued to Crowley in California, and is governed by California law.

23 **THE UNDERLYING LITIGATION AND SETTLEMENT**

24 7. A lawsuit was filed against Crowley and certain members of its board of
25 directors on November 30, 2004 in the Court of Chancery in the State of Delaware, entitled
26 *Franklin Balance Sheet Investment Fund v. Crowley*, C.A. No. 888-VCP (hereafter referred to
27 as the "*Franklin Fund Action*"). The *Franklin Fund Action* was both a class action and a
28 shareholder derivative action that alleged breaches of fiduciary duties owed by the director

1 defendants to Crowley and its stockholders, and it sought both damages and other relief. The
2 *Franklin Fund* plaintiffs' claims fall directly within the coverage of the Federal, Twin City and
3 RLI Policies. Each of those insurers was given timely notice of the claims.

4 8. In March 2007 Crowley notified Federal, Twin City and RLI (hereafter
5 collectively referred to as the "Insurers") that an opportunity had arisen to settle the *Franklin*
6 *Fund* Action on favorable terms, that there was a proposed settlement, and that a hearing in the
7 Delaware Chancery Court was set for April 27, 2007 -- at which time the court's approval of
8 the proposed settlement would be sought. Crowley's notification also sought the Insurers'
9 consent to the proposed settlement. On April 5, 2007 Federal's attorney Henry Nicholls
10 responded by telephone, advising Crowley's attorney that Federal "ha[d] no problem with
11 consenting" to the proposed settlement. Mr. Nicholls also requested additional information
12 relating to the settlement, which was promptly supplied by Crowley's attorneys. Crowley
13 received no further response from Federal, and it received no response whatsoever from either
14 Twin City or RLI. The Crowley board, upon the recommendation of a special committee of
15 independent directors, evaluated the terms of the proposed settlement and determined that it
16 was reasonable and in the best interests of the Company. The Company therefore proceeded to
17 complete the proposed settlement, which was approved by the Delaware Court. The court
18 specifically concluded that the settlement was "fair, reasonable and adequate and in the best
19 interests of the Company, its shareholders and the Class."

20 9. As part of the settlement, \$17.625 million was paid to the plaintiffs for a release
21 of their claims. That was a reasonable amount, given the probability that the plaintiffs would
22 have recovered a greater amount had the action gone to trial. As a result, the Insurers should
23 have consented to the settlement -- whether or not they also reserved their rights to contest
24 coverage. It also was agreed as part of the settlement that Crowley would pay, on behalf of the
25 director defendants, the plaintiffs' attorneys' fees and expenses in an amount to be determined
26 by the Delaware Court. The court ultimately issued an order awarding the plaintiffs their
27 attorneys' fees and expenses in the amount of \$4,219,458.26, and Crowley paid those fees and
28 expenses as ordered by the court. The court specifically concluded that this amount

PILLSBURY & LEVINSON, LLP
The Transamerica Pyramid
600 Montgomery Street, 31st Floor San Francisco, CA 94111

1 "represents a reasonable attorney's fee under the circumstances of this case." The fee award
 2 amount does not detract from the conclusion that the settlement was reasonable, since the
 3 plaintiffs likely would have obtained a higher fee award in addition to their recoverable
 4 damages had there been no settlement.

5 10. In determining whether the proposed settlement was reasonable and should be
 6 consented to, the Insurers were obligated to consider the amount proposed to be paid for a
 7 release of the plaintiffs' claims, the likely extent of the plaintiffs' recoverable damages should
 8 they prevail, and the probability that the plaintiffs would prevail. Under applicable California
 9 law, the Insurers were not permitted to consider coverage issues. However, the Insurers failed
 10 to conduct any reasonable investigation sufficient to enable them to determine whether the
 11 proposed settlement was a reasonable one that ought to be consented to. The Insurers'
 12 obligation to give good faith consideration to the proposed settlement, and not to unreasonably
 13 withhold their consent, derived not only from the express provisions of the Policies involved,
 14 but also from the covenant of good faith and fair dealing that is implied by law into every
 15 insurance contract.

16 11. On June 14, 2007 -- after the settlement was finalized -- Federal took the
 17 position that there was no coverage for the *Franklin Fund* settlement because Crowley had not
 18 obtained Federal's consent in writing before consummating it. Federal's argument is incorrect
 19 for three separate and independent reasons. First, under applicable California law, the Federal
 20 Policy's consent provisions were rendered inoperative (or waived or forfeited) by the
 21 circumstances that Federal (a) had no duty to defend and did not defend the *Franklin Fund*
 22 Action, and (b) reserved its right to deny coverage. An insurer's right to control the defense
 23 and settlement of an action against its insured is an adjunct to the insurer's duty to defend, and
 24 only where the insurer provides a defense and no conflict of interest exists does the insurer
 25 have the exclusive right to control defense and settlement. Such was not the case here, because
 26 Federal did not defend and its reservation of rights created a conflict.

27 12. Second, Federal's breach of the implied covenant freed Crowley from
 28 compliance with the Federal Policy's consent provisions. That is because an insurer cannot

1 deprive the insured of the benefits of the contract while, at the same time, insisting on the
 2 enforcement of its own rights under the agreement. Federal breached the implied covenant by
 3 its failure to promptly respond substantively in writing to Crowley's notice of the proposed
 4 settlement and request for consent; by its deceptive conduct in misleading Crowley into
 5 believing that Federal "had no problem with consenting" to the proposed settlement; by failing
 6 to warn Crowley that, if it proceeded to consummate the proposed settlement, Federal would
 7 deny coverage; and by waiting until after the settlement had been finalized to first raise the
 8 issue. Federal also breached the implied covenant by failing to conduct an adequate
 9 investigation of the reasonableness of the proposed settlement, by failing to give it good faith
 10 consideration, and -- ultimately -- by refusing to consent to the settlement and then denying
 11 coverage on that basis. In engaging in the foregoing conduct, Federal failed to give as much
 12 consideration to Crowley's interests as it gave to its own. Essentially, Federal treated the
 13 proposed settlement as nothing more than an opportunity to avoid coverage.

14 13. Third, Federal's foregoing conduct -- failing to adequately investigate, failing to
 15 give good faith consideration to the proposed settlement, and advising Crowley over the
 16 telephone that it "had no problem with consenting" to the settlement while failing to advise
 17 Crowley that it planned to deny coverage as soon as the settlement was finalized (on the
 18 ground that its consent in writing was not obtained) -- gives rise to a waiver or forfeiture or
 19 estoppel which would prevent Federal from enforcing the Federal Policy's consent provisions
 20 even if Federal had not breached the Policy.

21 14. Under the applicable law, Crowley was not obligated to obtain the Insurers'
 22 consent before settling the *Franklin Fund* Action. Its only obligations were to act in good faith
 23 in reaching a reasonable settlement, to give the Insurers notice of the proposed settlement, and
 24 to respond reasonably to any requests by the Insurers for further information. Crowley met all
 25 those obligations.

26 15. The attorney fees and expenses incurred by Crowley defending the *Franklin*
 27 *Fund* Action constitute a covered "Loss" as defined by the Federal Policy. So, too, do the
 28 amounts paid to settle that Action, since a covered "Loss" is defined as expressly including

1 “settlements.” Those amounts also constitute covered losses under the Twin City and RLI
2 Policies, which follow form with the Federal Policy. Crowley incurred covered defense costs,
3 in an amount to be proven at trial, that exceed \$600,000.00. The amount paid to settle the
4 *Franklin Fund* plaintiffs’ claims includes the \$17.625 million that was paid directly to the
5 plaintiffs as well as the \$4,219,458.26 that was paid to their attorneys, for a total of
6 \$21,844,458.26. Crowley was obligated to, and did, pay the defense costs and settlement
7 amounts on behalf of the director defendants. After deducting the \$500,000.00 retention
8 provided by the Federal Policy, Crowley’s total covered loss exceeds \$22 million (the
9 “*Franklin Fund Loss*”).

10 16. Federal, Twin City and RLI are obligated under their Policies to reimburse
11 Crowley for the *Franklin Fund* Loss, but they have failed to do so. That failure constitutes a
12 breach of those Policies which entitles Crowley to relief in this action.

FIRST CLAIM FOR RELIEF

Breach of Contract

(Against Federal)

16 17. Plaintiff realleges and incorporates by reference herein Paragraphs 1 through 16
17 of this First Amended Complaint as though fully set forth herein.

18 18. From November 1, 2004 to November 1, 2005 Federal insured Crowley under
19 the previously described Federal Policy.

20 19. Pursuant to the terms of the Federal Policy and the law, Crowley reasonably
21 settled the *Franklin Fund* Action and timely notified Federal of the settlement and made a
22 claim for indemnification.

23 20. The Federal Policy provides indemnity coverage to Crowley for the settlement
24 reached in the *Franklin Fund* Action and for the defense costs incurred by Crowley in that
25 Action.

26 21. Crowley timely demanded indemnity from Federal, and promptly provided all
27 proof of loss information requested by it.

22. Federal has failed to honor its obligation under the previously described Federal Policy to indemnify Crowley for the *Franklin Fund* Loss.

23. Crowley has duly complied with all the applicable material terms and conditions of the previously described Federal Policy, or its performance has been excused.

24. Federal has breached its contractual duties to Crowley, including the obligation to indemnify Crowley for the *Franklin Fund Loss*.

25. As a proximate result of Federal's breach of contract, Crowley has been damaged as outlined below.

9 26. By reason of Federal's breach of contract, Crowley has been caused to suffer,
10 and continues to suffer, ongoing loss in the amount of the unpaid insurance benefits that are
11 due (including reimbursement of the *Franklin Fund Loss*), together with interest thereon at the
12 legal rate from the dates Crowley paid the defense costs and settlement until the date when
13 those amounts are finally reimbursed by Federal.

14 WHEREFORE, Plaintiff prays for judgment against Federal as hereinafter set forth.

SECOND CLAIM FOR RELIEF

Breach of the Implied Covenant of Good Faith and Fair Dealing

(Against Federal)

18 27. Plaintiff realleges and incorporates by reference herein Paragraphs 1 through 26
19 of this First Amended Complaint as though fully set forth herein.

20 28. Implied in each insurance policy is a covenant by the insurer that it will act in
21 good faith and engage in fair dealing in connection with claims made by its insured; that it will
22 do nothing to interfere with the rights of its insured to receive policy benefits; that it will give
23 at least as much consideration to the interests of its insured as it gives to its own interests; that
24 it will investigate all possible bases for coverage; that it will not unreasonably withhold its
25 consent to a proposed settlement of an action against its insured; and that it will not refuse to
26 pay any claim without thoroughly investigating the foundation for any denial (hereinafter
27 referred to as "the implied covenant of good faith and fair dealing"). The implied covenant
28 obligated Federal to promptly investigate the reasonableness of the proposed settlement, to

1 give good faith consideration to it, and to exercise its own rights under the Federal Policy in
2 good faith.

3 29. At all material times, Federal violated the implied covenant of good faith and
4 fair dealing by, *inter alia*, the following:

- 5 (a) Consciously and unreasonably refusing to pay to Crowley insurance benefits
6 to which it is entitled pursuant to the previously described Federal Policy, and
7 depriving Crowley of insurance benefits rightfully due to it with the
8 knowledge that said conduct was and is wrongful and contrary to Federal's
9 obligations under the Federal Policy and the law;
- 10 (b) Consciously and unreasonably failing to properly investigate Crowley's claim
11 fairly and in good faith, and refusing to give Crowley's interests at least as
12 much consideration as Federal gave its own interests;
- 13 (c) Consciously and unreasonably denying Crowley's indemnity claim without
14 thoroughly investigating the foundation for the denial;
- 15 (d) Consciously and unreasonably misinterpreting the facts, policy provisions and
16 law at issue in a way calculated to deprive Crowley of insurance policy
17 benefits to which it is entitled; and
- 18 (e) Engaging in the other conduct specifically alleged in this Complaint,
19 including without limitation the conduct alleged in Paragraphs 8 and 10-13
20 above.

21 30. Crowley is informed and believes, and thereon alleges, that the aforementioned
22 conduct by Federal represents a common pattern and practice on its part.

23 31. Crowley is informed and believes, and thereon alleges, that in engaging in the
24 conduct alleged herein Federal acted with malice, fraud and/or oppression, as defined in
25 California Civil Code § 3294.

26 32. As a proximate result of Federal's actions, Crowley has been damaged as
27 alleged in Paragraph 26 above.

28

PILLSBURY & LEVINSON, LLP
The Transamerica Pyramid
600 Montgomery Street, 31st Floor • San Francisco, CA 94111

1 33. As a further proximate result of Federal's breach of the implied covenant of
2 good faith and fair dealing, Crowley has incurred, and will continue to incur, attorneys' fees
3 and related costs in order to obtain the insurance policy benefits unreasonably withheld by
4 Federal.

5 34. As a result of Federal's conduct alleged herein, Crowley is entitled to recover
6 compensatory damages, including insurance policy benefits, interest thereon, and attorneys'
7 fees and expenses, and it also is entitled to recover punitive damages from Federal in an
8 amount sufficient to punish and make an example of it, in order to deter similar conduct in the
9 future.

THIRD CLAIM FOR RELIEF

Declaratory Relief

(Against Twin City and RLD)

13 35. Plaintiff realleges and incorporates by reference herein Paragraphs 1 through 34
14 of this First Amended Complaint as though fully set forth herein.

15 36. An actual controversy has arisen and now exists between Crowley, on the one
16 hand, and Twin City and RLI (collectively, the “Excess Insurers”), on the other hand,
17 concerning their respective rights and obligations under the Twin City and RLI Policies
18 (collectively, the “Excess Policies”) in connection with the *Franklin Fund Loss*.

19 37. Crowley contends, and seeks a declaratory judgment declaring, that the
20 *Franklin Fund* Loss falls within the coverage of both the Federal Policy and the Excess
21 Policies, and that the Excess Insurers, along with Federal, are obligated to indemnify Crowley
22 for the *Franklin Fund* Loss -- with Twin City being obligated to indemnify Crowley for that
23 portion of said Loss exceeding the \$500,000 retention under the Federal Policy and Federal's
24 \$10 million primary limits, up to the full amount of Twin City's \$10 million limits; and with
25 RLI being obligated to indemnify Crowley for the remaining portion of said Loss, up to RLI's
26 \$5 million limits. The Excess Insurers dispute Crowley's contentions, and have disclaimed
27 any and all responsibility under the Excess Policies to indemnify Crowley for the *Franklin*

1 *Fund Loss* -- both asked the Court to dismiss *with prejudice* Crowley's claims against them in
 2 this case.

3 Crowley desires a judicial determination and declaration of Crowley's and the
 4 Excess Insurers' respective rights and duties under the Excess Policies, and specifically a
 5 declaration that the Excess Insurers are obligated -- along with Federal -- to indemnify
 6 Crowley for the *Franklin Fund Loss*.

7 WHEREFORE, Plaintiff prays for judgment against Federal as follows:

- 8 1. For compensatory damages according to proof;
- 9 2. For exemplary damages according to proof;
- 10 3. For attorneys' fees and expenses incurred in obtaining insurance policy benefits
 according to proof;
- 11 4. For costs of suit incurred herein;
- 12 5. For prejudgment interest according to proof; and
- 13 6. For such other and further relief as this Court may deem just and proper.

15 Plaintiff also prays for judgment against Twin City and RLI, as follows:

- 16 7. For a declaration of the parties' respective rights and obligations under the Twin
 City and RLI Policies, including a declaration that the Excess Insurers are
 obligated to indemnify Crowley for the *Franklin Fund Loss*, as alleged in
 Paragraphs 36-38 above;
- 17 8. For costs of suit incurred herein; and
- 18 9. For such other and further relief as this Court may deem just and proper.

22 **JURY DEMAND**

23 Plaintiff hereby demands a trial by jury.

24 Dated: April 18, 2008

25 Respectfully submitted,
 26 PILLSBURY & LEVINSON, LLP

27 By: /s/ Richard D. Shively
 28 Richard D. Shively
 Attorneys for Plaintiff
 CROWLEY MARITIME CORPORATION